

## ***Ad Hoc* Expert Group on Traditional Knowledge and Traditional Cultural Expressions**

**Geneva, December 9, 2018**

SUBSTANTIVE BACKGROUND NOTE

*Prepared by the International Bureau of WIPO*

1. The overall objective of the *ad hoc* expert group on traditional knowledge and traditional cultural expressions is, as indicated in the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC”) and the Decisions of the Thirty-Seventh Session of the IGC (“IGC 37”), which took place from August 27 to 31, 2018, to address specific legal, policy or technical issues. The results of the work will be reported to and further addressed by the IGC.

2. In accordance with the Decisions taken at IGC 37, Member States, through the Regional Coordinators, were invited to suggest the specific issues to be considered by the *ad hoc* expert group. The IGC Chair and Vice-Chairs then identified a list of issues from the suggestions made by Member States and provided them to the Regional Coordinators for comments. On the basis of the above, the Chair and the Vice-Chairs have identified the list as follows:

(1) Subject matter

- Traditional knowledge
- Traditional cultural expressions

(2) Cross-cutting issues related to traditional knowledge and traditional cultural expressions

- Interface between subject matter, criteria for eligibility and scope of protection
- Scope of protection (including possible “tiered approach”/“differentiated protection”).

3. This Substantive Background Note provides some background information on the list of issues, and proposes some questions for the *ad hoc* expert group to consider. It is not expected that this *ad hoc* expert group will be able to address all the issues and questions below. The Co-chairs of the group will provide further guidance on the specific issues to be covered at this particular meeting. It is recalled that traditional knowledge (“TK”) and traditional cultural expressions (“TCEs”) will also be addressed at IGCs 38, 39 and 40, and, if so decided by the IGC, at an *ad hoc* expert group that may meet before IGC 40.

### **Subject matter**

4. The current negotiating texts on TK and TCEs (documents WIPO/GRTKF/IC/38/4 and WIPO/GRTKF/IC/38/5) include draft definitions of TK and TCEs (Article 1 of the respective texts) and articles on subject matter (Article 3 of the respective texts).

5. In a legal instrument, provisions on subject matter generally aim at delineating the scope of protectable subject matter. International intellectual property (“IP”) standards often defer to the national level for determining the precise scope of protectable subject matter. International instruments can range from providing a general and broad description of subject matter, to a set of criteria the subject matter should satisfy to be eligible for protection (in the IGC context, these are referred to as “eligibility criteria”), to no definition at all. For example, the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (“the TRIPS Agreement”) does not define “invention”, but provides that patentable inventions are inventions which are new, involve an inventive step and are capable of industrial application (these are what are referred to in IGC discussions as “eligibility criteria”). The Paris Convention for the Protection of Industrial Property, 1979 (“the Paris Convention”) defines “industrial property” in broad and expansive terms. The Berne Convention for the Protection of Literary and Artistic Works, 1979 (“the Berne Convention”) provides a general description of “literary and artistic works”, an illustrative list of examples and criteria, such as originality and fixation in material form, to identify which literary and artistic works are protectable as copyright works.

6. If the *ad hoc* expert group considers that there is a need to define TK and TCEs in an international legal instrument(s), it is invited to further clarify the meaning of “traditional”. The characteristics of TK and TCEs throughout the world vary greatly, hence the importance of identifying those high-level and universal characteristics that belong in an international instrument(s). In particular, the *ad hoc* expert group is invited to discuss how best to articulate:

- the intergenerational nature of maintenance and transmission;
- the link/s between the TK and TCEs, on the one hand, and the originating culture and community, on the other;
- the collective nature of TK and TCEs; and
- their dynamic and evolving nature.

7. The *ad hoc* expert group is also invited to consider the necessity of including a temporal component (for example, “not less than 50 years”).

8. Regarding the definition of TCEs, the *ad hoc* expert group is invited to discuss the necessity of including examples of different forms of TCEs in the definition of TCEs (in the body of the definition or as footnotes).

### **Cross-cutting issues related to TK and TCEs**

9. Some of the issues under discussion cut across both the TK and TCEs texts (horizontal cross-cutting) and/or pervade two or more articles of at least one of the texts (vertical cross-cutting).

10. In more general terms and relating again to the question of “subject matter”, one view is that the definitions of TK and TCEs should be broad enough to cover all kinds of TK and TCEs, while another view is that the definition should be precise and limited for clarity and transparency purposes. If the definition is broad, then other elements, such as the “criteria for eligibility” (if any) and/or the exceptions and limitations, may need to act as a limiting filter, and/or the scope of protection (the extent of the rights) may need to do so. This example is used simply to illustrate that there is an interplay between the definition of subject matter, scope of protection and exceptions and limitations. This interplay may relate also to the balance that is inherent in all types of IP protection systems (and that underlies all cross-cutting issues), i.e. the balance between private rights and public interests.

11. Thus, the *ad hoc* expert group is invited to look at the interface between subject matter, criteria for eligibility, scope of protection and exceptions and limitations, and to consider:

- whether eligibility criteria (as that term is used in the IGC context) are necessary at all in relation to subject matter, since in elaborating rights it could be left to the scope of protection and to the exceptions and limitations to define more clearly what is ultimately to be protected; and
- based on the possible introduction of a tiered approach (see further below) to defining the scope of protection, whether the provisions on exceptions and limitations should also follow this approach, i.e., that various degrees of excepted acts would mirror the various kinds of subject matter and the tiered rights applied to them.

12. The scope of protection seeks to determine which specific acts in respect of protectable TK and/or TCEs ought to be prohibited or prevented. From the outset, the *ad hoc* expert group is invited to clarify:

- what is the appropriate approach: a rights-based approach, a measures-based approach or a combination of the two; and
- the flexibility necessary to allow the scope of protection to be determined at the national level.

13. The current draft articles (Article 5 of the TK and TCEs texts, respectively) evidence two main options, which are, to put it plainly, “the right to say no” option and “the right to be compensated” option:

- The first option would follow the model of exclusive rights, where rights holders have a bundle of rights which they own and can transfer or waive, as the case may be. Under this approach, rights holders have a set of rights which they can enforce against third parties. They, therefore, have the possibility to say “no” to uses that fall within their exclusive prerogatives;
- The second option is a right to remuneration or compensation. Stated otherwise, it is the right to be paid for certain uses, without the possibility to prevent or oppose those uses. This option is related to what has been described in literature as a “compensatory liability regime”. Existing IP systems are not wholly comprised of exclusive rights and do include rights to remuneration or compensation in certain cases.

14. A distinction may also be made between economic rights and moral rights. For example, under copyright law, economic rights allow the rights owner to derive financial reward from the use of his or her works by others, while moral rights refer to the right to claim authorship of a work and the right to object to any mutilation or deformation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author’s honor or reputation.

15. The IGC has discussed for several years a so-called “tiered approach” (also referred to as “differentiated protection”), whereby different kinds or levels of rights or measures would be available to rights holders depending on the nature and characteristics of the subject matter, the level of control retained by the beneficiaries and its degree of diffusion.

16. The tiered approach proposes differentiated protection along a spectrum from TK/TCEs that are available to the general public to TK/TCEs that are secret, sacred or not known outside the community and controlled by the beneficiaries.

17. The *ad hoc* expert group is invited to discuss:

- the appropriateness of economic and moral rights for different forms of TK/TCEs. For example, exclusive economic rights could be appropriate for some forms of TK/TCEs (for instance, secret and/or sacred TK/TCEs), whereas a moral rights-based model could, for example, be appropriate for TK/TCEs that are publicly available or widely known but still attributable to specific indigenous peoples and local communities;
- quality, level of control, degree of diffusion, including the issue on the relationship with public domain; and
- the practicality and legal implications of the proposed tiers.

18. In the TK context, differentiated protection in the tiered approach offers an opportunity to respond to the reality of the differences among secret TK, narrowly diffused TK and widely diffused TK, the definitions of which the *ad hoc* expert group is invited to discuss.

19. In the TCEs context, taking into account the practicality and legal implications of the proposed tiers, the *ad hoc* expert group is invited to discuss what criteria are appropriate and should be used in the TCEs context, in order to determine the tiers. It should be noted that criteria that may be relevant in the TK context may not necessarily apply in the TCEs context.

#### **Other issue**

20. The *ad hoc* expert group may also wish to discuss national laws designed to ensure the authenticity of the arts and crafts produced by indigenous peoples and local communities.

### **Useful resources**

21. There are some useful resources available on the WIPO website which the *ad hoc* expert group may wish to use as reference materials, such as:

- Chair's Information Note Prepared for IGC 38,  
[http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=420992](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=420992).
- WIPO/GRTKF/IC/38/6, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=411448](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=411448);
- WIPO/GRTKF/IC/38/7, The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis, [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=410365](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=410365);
- WIPO/GRTKF/IC/17/INF/8, Note on the Meanings of the Term "Public Domain" in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore,  
[http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=149213](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=149213);
- WIPO/GRTKF/IC/17/INF/9, List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found,  
[http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=147152](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=147152);
- Regional, National, Local and Community Experiences,  
[http://www.wipo.int/tk/en/resources/tk\\_experiences.html](http://www.wipo.int/tk/en/resources/tk_experiences.html);
- Lectures and presentations on the selected topics,  
[http://www.wipo.int/tk/en/resources/tk\\_experiences.html#4](http://www.wipo.int/tk/en/resources/tk_experiences.html#4).

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